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No. 82-87

In the Supreme Court of the United States

OCTOBER TERM, 1982

PUERTO RICO MARITIME SHIPPING AUTHORITY, PETITIONER

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was substantial evidence on the record to support the Federal Maritime Commission's modification of petitioner's projected fuel costs in its request for a general rate increase.

2. Whether the court of appeals properly upheld the Commission's rejection of petitioner's method of forecasting fuel costs.

3. Whether the Commission erred in declining to reconsider all of petitioner's forecasts after it had modified petitioner's fuel cost projections as unsupported by the record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 678 F. 2d 327. The order of the Federal Maritime Commission (Pet. App. 51a-97a) is not yet reported. The Initial Decision of the Administrative Law Judge (Pet. App. 98a-230a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1982. A petition for rehearing was denied on June 25, 1982 (Pet. App. 231a-232a). The petition for a writ of certiorari was filed on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Maritime Commission is the federal agency authorized under the Intercoastal Shipping Act of 1933, 46 U.S.C. (& Supp. IV) 843 *et seq.*, to regulate common carriers by water in intercoastal commerce. The Intercoastal Shipping Act as amended in 1978, Pub. L. No. 95-475, 92 Stat. 1494, sets stringent time deadlines for the investigation of general rate increases exceeding three percent. 46 U.S.C. (Supp. IV) 845(b). Hearings are to be completed within 60 days, an initial decision by the Administrative Law Judge is to be rendered within 120 days, and a final decision by the Commission is to be served within 180 days after the new rates are scheduled to go into effect. *Ibid.*[1] If the Commission fails to meet the statutorily-imposed deadline for issuing its final decision, the rates under investigation are conclusively deemed to be just and reasonable. *Ibid.*

At the rate hearing, the carrier has the burden of proving that its rates are just and reasonable. 46 U.S.C. (Supp. IV) 845(b). If the Commission finds that the new rates are unjust or unreasonable, it may determine and prescribe maximum and/or minimum rates. 46 U.S.C. (Supp. IV) 845(a). Any amount charged to shippers in excess of that ultimately determined to be just and reasonable must be refunded to the shippers by the carrier, with interest computed on the basis of the prime lending rate. 46 U.S.C. (Supp. IV) 845(c)(2).

Under the FMC's regulations, an applicant for a rate increase exceeding three percent must supply detailed revenue and expense forecasts for a "test year," which commences the month after the effective date of the rate increase. 46 C.F.R. 512.2(f)(1)(ii), (iv) and (v). Because of

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[1]The Commission may extend the 180-day limit only once and only for 60 days and it must report to Congress the reasons for the extension.

the timing requirements in the statute, a carrier's forecasts must necessarily project revenues and expenses for a period 4-16 months after a forecast is made (Pet. App. 5a). Accordingly, almost no data on the carrier's actual costs and revenues during the test year are available to the Commission at the time of its decision.

2. Petitioner Puerto Rico Maritime Shipping Authority is a nonstock corporation owned by the Commonwealth of Puerto Rico (Pet. App. 5a). It is a common carrier by water subject to the Commission's regulatory authority, serving the trades between the Atlantic and Gulf Coasts of the United States and Puerto Rico. In December 1980, petitioner filed general rate increases with the Commission averaging 17.2%, scheduled to become effective February 3, 1981 (Pet. App. 5a). Similar general rate increases previously had been requested by petitioner's competitors in the Puerto Rico trades (*ibid.*). Before the Commission, the Drug and Toilet Preparation Traffic Conference (a trade organization of shippers), the Puerto Rico Manufacturers Association, the Government of the Virgin Islands, and the Chamber of Commerce of Puerto Rico challenged all of the rate increases (*ibid.*).

Prior to the effective date of petitioner's rate filing, the Commission ordered an investigation, without suspension, into the lawfulness of the rate increases filed by the other carriers. The Commission subsequently included petitioner's rate increases in the same investigation, and also declined to suspend the rate increases, which became effective February 27, 1981 (Pet. App. 6a n.7, 102a). The investigation was the first of its kind held under the 1978 amendments to the Intercoastal Shipping Act of 1933, Pub. L. No. 95-475, 92 Stat. 1494.

The single most significant item in petitioner's rate submission was its forecast of steadily rising fuel costs for the test year, which accounted for over one-half of petitioner's requested increase (Pet. App. 15a). Petitioner forecasted that its fuel costs during the year would increase by 88%, totalling $25,000,000 over its costs during the most recent year prior to the rate filing (*id.* at 20a). The forecast was prepared in November 1980 in preparation for the December filing of the increase.

An ALJ held an extensive, largely documentary hearing, and rendered an Initial Decision on July 20, 1981, in which he upheld petitioner's fuel cost forecast and recommended approval of its rate increases (Pet. App. 191a-195a).[2] On September 25, 1981, the Commission modified the Initial Decision by disapproving petitioner's increases to the extent they exceeded a weighted average of 14.5% (*id.* at 92a).[3] The Commission concluded that the carrier's forecasted fuel costs for the test year were unreliable. The Commission recognized the difficulty of predicting the cost of fuel with precision or certainty (*id.* at 77a), but held, nonetheless, that petitioner's forecasting methodology was flawed and that the forecast had been undermined by marked changes in world oil markets occurring after petitioner's forecasts were prepared (*id.* at 77a-79a). Although the Commission could have denied petitioner any rate increase because it had failed to sustain its burden of proof (*id.* at 22a, 78a), the Commission decided, instead, to use

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[2]As the court of appeals noted, "[a] close reading of the ALJ's decision reveals that he did not so much accept the methods and results proffered by [petitioner] as reject the various criticisms of the forecast by other participants" (Pet. App. 15a n.13).

[3]The Commission approved the rate increases filed by the other carriers in full. Unlike petitioner, those carriers did not attempt to justify their increases by relying primarily on rising fuel costs (Pet. App. 77a, 195a).

the last known fuel price actually paid by petitioner during the test year to construct a new average fuel cost for the carrier (*id.* at 22a, 78a). With the reduced fuel costs, the proposed general rate increases became unreasonably high to the extent they exceeded 14.5% (*id.* at 80a).

The FMC ordered petitioner to roll back 2.5% of its rate increases within 30 days and, as required by the 1978 amendments to the Intercoastal Shipping Act of 1933, to make refunds (plus interest) to shippers of those portions of the rate increases found to be unreasonable, and to file within 60 days a full accounting of all refund payments made (Pet. App. 92a-93a). On the basis of petitioner's projected revenues and expenses, the reduced rate increase resulted in petitioner's realizing a projected rate of return on rate base for the test year of 17% (*id.* at 80a n.41).

3. The court of appeals affirmed (Pet. App. 1a-50a).[4] The court found no fault with the Commission's conclusion that by projecting only from prices paid in 1980, petitioner used an unacceptably narrow data base that called into question its forecasting methodology (*id.* at 18a). In addition, the court agreed with the FMC that petitioner's forecast of constant quarterly increases during the test year did not square with actual experience in 1980, which showed a wide variance of changes from quarter to quarter (*id.* at 18a-20a). Given this discrepancy, the court stated that "it was not unreasonable for the Commission to question [petitioner's forecast] methodology * * *" (*id.* at 18a n.17).

The court also upheld the Commission's rejection of petitioner's forecast on the ground that conditions in world oil markets had changed significantly since the forecast was

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[4]On November 20, 1981, the court of appeals granted a stay of the Commission's order insofar as it required the payment of refunds, and on July 27, 1982, the court ordered a stay of the mandate and continued the stay of refund payments.

prepared in November 1980. The court found that substantial evidence in the record supported the Commission's conclusion that a supply "glut" had developed in oil markets at the time of the hearings in March and April 1981 (Pet. App. 20a-22a). Specifically, the court of appeals found that the record was sufficient "to arouse in the Commission a legitimate uneasiness and skepticism about a prediction based solely on the experience of the prior year that would result in an 88-percent rise, totaling over $25,000,000, in [petitioner's] fuel costs over the next year" (Pet. App. 20a).

The court also approved the Commission's construction of an alternate fuel cost factor based on the most recent price paid by petitioner during the test year. The court characterized the Commission's action as a pragmatic adjustment in the absence of persuasive proof by either the carrier or shippers as to an appropriate estimate of fuel prices for the forthcoming test year (Pet. App. 22a).

ARGUMENT

1. Petitioner first argues (Pet. 12-14) that the Commission based its decision to reject the fuel cost forecast on extra-record evidence of an OPEC meeting of May 1981 (Pet. 13) and other information not in the record.[5] The

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[5]At the outset of its argument, petitioner challenges (Pet. 10-12) the court of appeals' reference to the availability of "expedited" rate increases. Although the court's statement is irrelevant to the decision whether the record evidence supported the FMC's decision, it is nonetheless an essentially accurate recognition by the court that petitioner has options available to it if experience proves that the rates set by the Commission fail to generate sufficient revenues. In its order, the Commission specifically noted that if petitioner experienced fuel costs during the test year greater than those allowed by the Commission, the carrier could improve its financial position by filing new general rate increases (Pet. App. 79a). Indeed, petitioner already has obtained a rate increase in addition to that involved in this case (Pet. 18 n.10). In addition, the Act and the Commission's regulations specifically provide that under certain circumstances a carrier may file a general rate

court of appeals found, however, that the Commission's conclusion that it could no longer rely on petitioner's forecast predicting steadily increasing prices for the test year was grounded on substantial evidence in the record (Pet. App. 20a-22a). The court specifically discussed the record evidence relating to a change in the world's oil market and, even though it acknowledged that the record evidence did not compel any particular conclusion, it held that it was sufficient to support the decision of the Commission (*id.* at 19a). Obviously, this factual determination made by a unanimous court of appeals creates no issue warranting review by this Court.

2. Petitioner also asserts (Pet. 14-16) that the court of appeals erred in upholding the Commission's rejection of the methodology used in petitioner's fuel cost forecast. The methodology issue is, however, subsumed by the factual determination that the world oil market's conditions had changed. The change in the market alone was sufficient to place in question the reliability of petitioner's forecasts for purposes of setting the rate. Thus, this issue seems of little practical significance independent of the first issue. Moreover, the court of appeals simply held that the Commission reasonably rejected petitioner's projection of a steadily increasing forecast because it was based on a limited and unstable set of data points (Pet. App. 18a n.17). Certainly

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increase, supported by abbreviated data, which can go into effect on short notice (*id.* at 79a n.37, 234a). The Commission contrasted these options with the lack of effective remedies available to shippers if petitioner's rate increase were approved as filed, and the carrier thereafter realized an excessive rate of return due to fuel costs lower than those forecast. In such circumstances there would be no remedy for shippers, because the Commission would have already issued a finding that the general level of the rates was justified (Pet. App. at 79a). Thus, the court of appeals accurately assessed the relative equities of the parties, and, even if it had not, its analysis on this point cannot alter the legal issues in this case.

this reading of the Commission's decision, which has no precedential value beyond the decision in this case, creates no issue warranting review by this Court.

3. Petitioner contends finally (Pet. 17-18) that the decision of the court of appeals conflicts with that of the Seventh Circuit in *Indiana Municipal Electric Association* v. *FERC*, 629 F. 2d 480 (1980), because it allowed the FMC to modify one aspect of petitioner's rate forecast without reopening the entire matter to consider the effect of changed circumstances on other projected costs and revenues. There is, however, no conflict on this issue.

Petitioner concedes (Pet. 17) that this argument *assumes* that the decision of the Commission could be supported only by extra-record evidence.[6] As we already have shown (page 7, *supra*), the court of appeals expressly rejected this argument, finding substantial evidence on the record. Thus, this issue depends on a fact-bound determination by the court of appeals that does not warrant review by this Court.[7]

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[6]Petitioner refers (Pet. 17) parenthetically to post-forecast evidence as part of this argument, but it has not cited any record evidence coming to light after its forecast and before the Commission's decision that would require the FMC to alter petitioner's rates, except for the evidence concerning the condition of world oil markets.

[7]Petitioner's reliance on *Indiana Municipal* is, in any event, misplaced. The court in that case was reviewing the agency's refusal to consider new evidence, which the court justified because its review was limited to whether the rate as a whole was just and reasonable. 629 F. 2d at 485. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-799 (1968). In this case the agency has modified only one aspect of petitioner's rate as not supported by the evidence. Under the teaching of *Indiana Municipal* and decisions of this Court, that action would be problematic only if the final rates set by the Commission were unjust or unreasonable, which the court of appeals expressly held was not the case (Pet. App. 32a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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